HR-85-009-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by Linda C. Johnson, Commissioner, Department of Human Rights,

Complainant,

vs.

Bigos Properties, Inc.,

Respondent.

FINDINGS OF FACT, CONCLUSIONS, ORDER, AND MEMORANDUM

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:30 a.m, on Tueaday, July 9, 1985 at the Office of Administrative Hearings in Minneapolis, Minnesota pursuant to a Complaint and a Notice of and Order for Hearing dated June 3, 1985. Additional hearings were held at the same location on July 10 and 16, 1985.
The record was supplemented with the deposition of one witness. That deposition was submitted in lieu of testimony at the agreement of the parties.

Carl M. Warren, Special Assistant Attorney General, 1100 Bremer Tower, 7th Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant. Joel A. Seltz, Mirviss, Setlz, Seltz & Rooney, P.A., 6600 France Avenue South, Suite 358, Minneapolis, Minnesota 55435, appeared on behalf of Bigos Properties (the Respondent). The record closed on November 1, 1985, when the last authorized brief was filed.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69.

STATEMENT OF ISSUES

The issues in this case are whether or not the Respondent discriminated

against the charging party, Ella Roby, on the basis of her race, contrary to the provisions of Minn. Stat. 363.03, subd. 2(l)(b) (1984), and if so, the relief, if any, that should be given to her.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Ella and Collins Roby reside in the English Manor Apartments in Maplewood, Minnesota with their three children, ages 2, 5 and 13. They have lived at English Manor in Apartment 14 since June 3, 1982. English Manor is one of two apartment buildings in a complex owned by the Respondent. The apartment building where the Robys reside consists of a basement and two floors. There are apartments on all three levels. The Roby's apartment is located on the ground (second) floor.

2. The Respondent is a family-owned corporation engaged in the real estate business. Its business consists of the ownership, management and rental of approximately 12,000 dwelling units. For the most part, those dwelling units are located in larger apartment buildings in the Twin City area. The Respondent's apartment buildings have varying percentages of Black tenants.

3. On November 26, 1984, the Respondent purchased English Manor which is located at 1809 English Street.

4. Prior to the Respondent's purchase, Steven Highstrom and his girlfriend, LeeAnn Drobnick, were employed as the resident managers of English Manor. They were generally responsible for the maintenance and rental of apartment units at the complex and reported to a management company the former owner retained to manage the buildings. Highstrom and Drobnick resided together in Apartment 7, which was provided to them as part of their compensation.

5. On November 26, 1985, Highstrom and Drobnick were given a written, 30-day notice that their employment was being terminated due to the sale of English Manor and the Respondent's desire to hire other resident managers to replace them.

6. Late in November, 1984, Ted Bigos, one of the Respondent's owners, talked to Highstrom about his duties. At that time, Bigos hired Highstrom for one week to go through all the apartment units at the complex and make any plumbing repairs that were necessary. In addition, Highstrom was to familiarize the Respondent's new resident managers -- Bob and Kim Jackson -- with the apartment buildings. There was some discussion at that time about the possibility of other employment with the Respondent at an apartment building in St. Louis Park, but that employment never materialized. The Respondent's relationship with Highstrom and Drobnick rapidly deteriorated, and as a result of their failure to pay rent, the Respondent eventually brought unlawful detainer proceeding against them in order to obtain their eviction. Highstrom and Drobnick moved from English Manor late in January, 1985.

7. At the time Respondent purchased English Manor, Bigos assigned Laura Ryan, a long-time property manager of the Respondents, to oversee the cleaning and repair of the building. She was also responsible for obtaining full occupancy and the identification of problem tenants.

8. In late November, 1984, Ryan met with Drobnick in Apartment 7 to review the current status of the rentals at English Manor in order to determine how many vacancies there would be in December when the Respondent took over the buildings. During that meeting, Ryan asked Drobnick to identify any problem tenants currently residing in the buildings. Drobnick identified the Robys as one of three problem tenants. Drobnick said that building residents had complained about loud noises and disturbances by the Robys. Drobnick also told Ryan that Kim DeLougherty (a white woman) was a problem because she had a Black boyfriend who had created disturbances and who she thought was selling drugs in the parking lot. Drobnick also identified another white tenant as a problem because her children had created disturbances and caused property damage to one of the buildings.

9. A few days later, in early December, Ryan discussed building tenants with Highstrom. That discussion occurred in Bob and Kim Jackson's apartment. Highstrom had come in to talk to Bob Jackson about a maintenance problem and as he was leaving Ryan had a conversation with him. After stating that she noticed that some Black families and some Oriental families resided in the buildings, Ryan asked Highstrom if he knew who lived in Apartment 14. Highstrom said that the Robys, a Black family, lived there. At that point, Ryan asked Kim Jackson to write the word "black" next to the Roby's name on the tenant list she had. At that time, Bob Jackson, who was looking out of the window, observed the Robys' eldest daughter and remarked" "There comes one of those little niggers around the building now"." Highstrom was upset with Jackson's remark and left the apartment.

10. The next day Highstrom was in the Jackson's apartment again and overheard Bigos and Ryan discussing the mailing of eviction notices to the - Robys and to DeLougherty. When Highstrom heard that, he told Bigos that he could not serve an eviction letter, but would be required to start an unlawful detainer action. Bigos responded that he would not commence an unlawful detainer action if he could scare them out, and that he wanted to avoid the costs of an unlawful detainer action. Later Ryan discussed sending a warning letter to the Robys with the Respondent's central office secretary (Gerri). However, that letter was never sent out. Bigos concluded that the Robys should have a chance to prove themselves to him and that he should not start any action to evict them until he had grounds for doing so.

11. On or about January 1, 1985, Debra Smith moved into Apartment 21, which was directly above the Robys' apartment. Smith immediately began complaining to the Jacksons about the loud noises and disturbances created by the Robys. Two days later she was allowed to transfer to another vacant apartment in the complex. As a result of Smith's complaints about the Robys, Bigos wrote to them on January 7, 1985 noting that he had received several complaints about loud parties and screaming in their apartment. The letter indicated that he would not tolerate such disturbances, and he directed the Robys to correct the situation, noting that if he received more complaints he

would be required to take further action. Shortly after receiving this letter from Bigos, Ella Roby telephoned him to discuss the letter. She told Bigos that her family had not had any loud parties and was not creating any disturbances. She felt that Bigos was not listening to her side of the story and threatened to take him to court. Bigos told her that the matter could be resolved out of court and he said, in effect, that she should stop making noises or simply move out.

12. Since Ella Roby was,unable to persuade Bigos that her family was not making noises or having paties, she filed a charge of racial discrimination with the Minnesota Department of Human Rights on January 17, 1985. Her discrimination charge noted that she had been subjected to unfair, ongoing harassment and differential treatment due to her race by the Respondent's secretary (Gerri) and the caretakers at English Manor. She alleged that she had been subjected to unwarranted complaints, reports and notices regarding disturbances by her family resulting in Bigos' issuance of a written warning to her.

13. Apartment 21 was rented to Bernadette Bissonette and Diana Quinn the day after Smith moved out. Bissonette and Quinn signed a lease on January 4, 1985 and immediately began moving in. They had completely moved in by January 12, 1985. As soon as they moved in, Bissonette and Quinn were disturbed by noises from the Robys' apartment. The disturbances consisted of loud arguments between Ella and Collins Roby as well as noise created by their children, who were running around late at night and crying early in the morning. Bissonette and Quinn mentioned the noise to the Jacksons during the two week period following January 12, 1985, but did not make a formal written complaint. During that two-week period the Robys' children were consistently making disturbances late at night and as early as 4:00 in the morning, and the Robys themselves had frequent arguments at night and early in the morning. Bissonette and Quinn were regularly awakened from sound sleep at night, and during the evening, they were required to keep the volume on their television set or stereo loud in order to drown out the noise coming from the Robys' apartment.

14. On Friday, January 25, the Robys were particularly noisy and Bissonette complained to the Jacksons. Bob Jackson went to the Robys' apartment that evening and asked them to quiet down. Collins Roby was uncooperative. Consequently, Jackson called the Maplewood Police Department. The police arrived later that evening and instructed the Robys to be quiet.

15. On Thursday, January 31, 1985, the Robys were noisier than usual, and kept Bissonette and Quinn awake from 11:00 p.m. until 4:00 the next morning, when they had a loud argument. As a result of the Robys' disturbances on January 25 and again on January 31, Bissonette and Quinn wrote to the Respondent notifying them that they were tired of calling Kim and Bob Jackson with complaints about the Robys, and since the Jacksons suggested that they write to Bigos, they were doing so. In their letter, Bissonette and Quinn noted that they were tired of being awaken by the constant noise and arguments in the Robys' apartment.

16. The Jacksons' communicated Bissonette and Quinn's oral complaints about the noise coming from the Roby's apartment to Bigos on one or more occasions prior to January 21, 1985. As a result, on January 21, l985, Bigos wrote the Robys advising them that the loud noise and other disturbances they caused constituted a breach of their lease and that the Respondent expected them to vacate their apartment by noon on February 28, 1985. The Robys did not vacate their apartment and an unlawful detainer proceeding was commenced. However, the Robys still reside in their apartment.

17. The noises made by the Robys were not at a normal level. It was of a such a magnitude that Quinn routinely used cotton in her ears in order to sleep, and both Quinn and Bissonette were awoken from sound sleep several times each week. The noise level was so high that they were embarrassed to have friends over and it eventually lead to their decision to move from English Manor.

18. On or about January 22, 1985, a copy of Ella Roby's charge of discrimination was served upon the Respondent. Subsequently the Department conducted an investigation into the allegations in that charge. On April 4, 1985, the Complainant found probable cause to believe that the Respondent had committed an unfair discriminatory practice which it unsuccessfully attempted to conciliate.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The the Administrative Law Judge has subject matter jurisdiction herein under Minn. Stat. 363.071, subds. I and 2 and 14.50 (1984).

2. That the Complainant gave proper notice of the hearing in this matter and fulfilled all relevant substantive and procedural requirements of statute and rule.

3. That the Respondent is the owner of real property for purposes of Minn. Stat. 363.01, subd. 12 and 363.03, subd. 2(l) (1984).

4. That since the Complainant failed to establish direct evidence of a discriminatory intent to harass or evict the charging party and her family on the basis of race, the burden of proof did not shift to the Respondent to establish that it would have proceeded with eviction actions in spite of a discriminatory intent.

S. That the Complainant did establish a prima facie showing that the Respondent's eviction actions resulted from a discriminatory intent, but the Respondent established that it had legitimate non-discriminatory reasons for its actions which were not shown to be a mere pretext for discrimination, and the Complainant failed to establish by a fair preponderance of the evidence that the Respondent's actions violated the provisions of Minn. Stat. 363.03, subd. 2(l) (1984).

6. That since the Respondent's actions were not taken for a racially discriminatory purpose, the Complainant's Complaint must be dismissed and no relief should be awarded.

Based on the foregoing Conclusions of Law and for the reasons set forth in attached Memorandum, the Administrative Law Judge makes the following:

I ORDER

IT IS HEREBY ORDERED That the Complaintant's Complaint be and the same hereby is dismissed.

Dated this day of November, 1985.

JON L. LUNDE
Administrative Law Judge

Reported: Transcript Prepared

MEMORANDUM

This case involves the Respondent's alleged violation of the provisions of Minn. Stat. 363.03, subd. 2(l) (1984), which makes it an unfair discriminatory practice for the owner of any real property or the agent of any such owner to withhold from any person or group of persons any privileges in the rental of real property because of race. Generally speaking, there are two ways to establish a charge of discrimination under the statute. Each is conceptually different and involves a different allocation of the burden of persuasion and burden of producing evidence. In most cases, the order and allocation of proof follows that set out by the United State Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In that case the Court held that the initial burden of going forward with the evidence to establish a prima facie case of discrimination rests with the Complainant. Once a prima facie showing is established by the Complainant, an inference of discrimination arises, and the burden of going forward with the evidence shifts to the Respondent, who is required to articulate a legitimate, non-discriminatory reason for the actions it took. If the Respondent establishes a legitimate, non-discriminatory reason for the action, the Complainant may then present evidence showing that the articulated non-discriminatory reason presented by the Respondent is a mere pretext for discrimination. Under the McDonnell-Douglas test the ultimate burden of persuasion rests with the Complainant.

As noted by the Complainant, the McDonnell-Douglas test is not required to be followed when direct evidence of discrimination is available. Bell v. Birmingham Linen Service, 715 F.2d 1552, 1556 (11th Cir. 1983). When there is direct evidence of a discriminatory intent, which is believed by the fact finder, the burden of persuasion (proof) shifts to the Respondent to prove by a preponderance of the evidence that the action would have been taken even

absent the discriminatory motive.

In this case, the Complainant argues that there is direct evidence of discrimination sufficient to support a finding of a discriminatory intent and
to shift the burden of proof to the Respondent. The direct evidence of discrimination, in the Complainant's view, consists of the following factors:
that Ryan asked Highstrom whether there were any black tenants residing in

English Manor; that Ryan marked the word "black" next to Roby's name on a tenant list; that the Respondent's agent stated a desire, intent and policy of evicting black tenants; that Kim DeLougherty and the Robys were to be harassed with warning letters and then evicted; that Bob Jackson referred to one of Robys' eldest daughters as a "nigger"; and that Bob Jackson manufactured complaints about the Robys and called the police to their apartment without cause. If established, those factors might be sufficient to constitute direct evidence of discrimination. However, in this case, all the factors listed by the Complainant were not established. There is persuasive evidence that Ryan marked the word "black" next to Roby's name on the tenant list and that Bob Jackson referred to the Roby's eldest daughter as a "nigger". However, the other listed factors were not established by a fair preponderance of the evidence. There is no persuasive evidence that Bigos or any of the Respondent's agents stated a desire, intent or policy of evicting black tenants, or that Kim DeLougherty or the Robys were going to be harassed with warning letters and ultimately evicted if they did not voluntarily terminate their tenancy because of their race; and there is no persuasive evidence that the Respondent or any of its agents manufactured complaints about the Robys and called the police to her apartment without cause as alleged by the Complainant. Laura Ryan did state to Highstrom that she noticed that there were some Black families residing in English Manor and then made inquiries regarding the Robys. However, her statements and questions were not shown to have been designed to identify Black tenants so that they could be evicted. Moreover, Bob Jackson's reference to the Roby's oldest daughter as a "nigger", while reprehensible, does not constitute direct evidence of discrimination in this case.

In State by Roberts v. Sports & Health Club,_Inc., 365 N.W.2d 799, 802 (Minn.App. 1985), the Court implied that the traditional McDonnell-Douglas test should be followed except in "rare" situations involving a respondent that "openly" discriminates against a particular person or group. This is not that kind of rare case, because the evidence of discrimination presented by the Complainant does not constitute the kind of "open" discrimination mentioned by the Court of Appeals. Therefore, it is necessary to apply the McDonnell-Douglas test. A prima facie showing would usually be made by establishing that the charging party is a Black person who was given warnings and whose eviction was sought for groundless reasons, or by showing that other tenants engaged in similar behavior but were not given warnings or evicted. If either is established, a prima facie showing of differential treatment readily explainable only by the charging party's race would exist. In this case the Complainant did not show that the Respondent's complaints were groundless or that the Charging Party was treated differently. Nonetheless, the Administrative Law Judge is persuaded that a prima facie showing was made

because of the racial epithet used by Jackson and Ryan's racial comments. The Complainant established that the Charging Party is a Black female, that she and her family had resided at English Manor for a long period of time without any compliants from other tenants and that she received a warning letter on January 7, and a subsequent notice terminating her lease, shortly after Respondent purchased the property. Those facts, coupled with Ryan's interest in their race and Jackson's racial epithet, establish a prima facie showing of a discriminatory motive by the Respondent and its agents.

However, the Respondent did articulate a legitimate non-discriminatory reason for its actions. It presented evidence that the Robys were identified by Drobnick as problem tenants when the Respondent purchased English Manor, evidence that Debra Smith moved out of the apartment directly above the Robys on approximately January 3, 1985 because of the disturbing noises made by the Robys, and evidence of problems Bissonette and Quinn experienced after they moved into the apartment above the Robys on January 12, 1985.

The Complainant argues that the reasons advanced by the Respondent are a mere pretext because there is no proof that Debra Smith vacated the apartment above the Robys on January 3, 1985 and no evidence that Bissonette and Quinn complained about the Robys prior to the Respondent's January 21, 1985 letter terminating their lease. Complainant also argued that the Robys had never been identified as problem tenants and were not, in fact, problem tenants prior to the Respondent's purchase. The Administrative Law Judge is not persuaded by those arguments.

Bissonette and Quinn were clearly disturbed by the noise made by the Roby family after they moved in to their apartment on January 12, 1985. They were credible witnesses. Their testimony shows that the Roby children caused disturbances until late in the evening and that their youngest child caused disturbances in the early morning hours. Moreover, their testimony persuasively establishes that the Robys themselves created disturbances with frequent arguments in the early morning hours -- between midnight and 4:00 a.m. -- when they would yell at one another over extended periods of time. The fact that Quinn put cotton in her ears to sleep, that Quinn and Bissonette were required to keep the volume of their television set on a high volume to drown out the sound created by the Robys and the fact that they were awoken, from a sound sleep several times a week establishes that the Robys were indeed noisier and more distruptive than would normally be expected of a tenant. It is unlikely that the Robys became noisy, or that their living patterns changed significantly, commencing at the time that Bissonette and Quinn became tenants at English Manor.

Moreover, the evidence presented shows that Bissonette and Quinn did mention the noise the Robys made shortly after they moved in, although they made no formal written complaint about that noise. The evidence also shows that Bissonette and Quinn orally complained to Bob Jackson prior to February 1, 1985, when they sent their first letter to the Respondent. Furthermore, while the sequence of events and the precise dates of the occurrences discussed were not established with certainty, Bissonette and Quinn's letter to the Respondent suggests that the Robys were unusually loud and noisy on Friday, January 25, 1985 and again on Thursday, January 31, 1985. The record strongly suggests that they had orally complained to Jackson on one of those

occasions. It seems likely that as a result of their complaints on one of those occasions Jackson summoned the police to the Roby's apartment. The record shows that the police did come there sometime around the first day of February. In addition, it is likely that Quinn and Bissonette's oral complaints to Bob Jackson lead to the January 21 letter in which the Respondent terminated the Roby's lease. Bissonette's testimony and the letter she sent to the Respondent indicate that she was tired of complaining to Bob Jackson, and shows that she had, on several occasions, discussed the noise the Robys were making before writing her letter. Under these circumstances, it does not seem unusual that the Respondent would have decided to terminate the Roby's lease on January 21.

It was also suggested that Smith may never have moved in and out of her apartment in early January due to disturbances created by the Robys, and it was argued that the Respondent's failure to summon her as a witness requires that an adverse inference be drawn against its allegations regarding her tenancy. That is not persuasive. The Respondent is not required to prove that Smith did move out because of disturbances created by the Robys, and the Complainant failed to show that the Smith incident was a mere pretext. The Administrative Law Judge is persuaded that there were disturbances prior to the time Bissonette and Quinn moved in, and that it is likely that a prior tenant would have moved because of the disturbances Quinn and Bissonette testified about. Moreover, the Administrative Law Judge is not persuaded by Drobnick's denial that she mentioned the Robys as troublesome tenants. Given the noise they did create after Bissonette and Quinn moved in, her denial that they had not created any disturbances prior to that time is not credited. Therefore, on the basis of the entire record, it is concluded that the Complainant has failed to establish by a preponderance of the evidence that the Respondent's warning letters, notices of termination or subsequent unlawful detainer actions were motivated by any racial animus but resulted from the disturbances the Robys created. Those disturbances exceeded what one would normally find to be acceptable.

Bigos testified that he intended to get rid of problem tenants and that he considered the Robys to be problem tenants because of the noise they made. His actions were consistent with his efforts to improve English Manor and to weed out undesirable tenants. The Robys could reasonably have been concluded to be undesirable due to the excessive noise they made. While the noise levels coming from their apartment did not annoy all the tenants, and might, not annoy every tenant, they were in excess of the levels one would reasonably expect, and explain the action Bigos took.

Although another tenant Bigos removed from English Manor was a White woman with a Black boyfriend, that does not support an inference that Bigos desired to get rid of Black tenants. DeLougherty's Black boyfriend had been a problem, as Highstrom testified, and Drobnick suspected that he was selling drugs from the premises. Any rational landlord would want to preclude that kind of behavior and the Respondent's decision to evict her does not seem unusual and does not establish an intent to remove Black tenants from English Manor.

Therefore, on the basis of the entire record, it is concluded that the Complainant has failed to establish that the Respondent's actions were motivated by an intent to discriminate against the Charging Party and her

family as a result of their race. Clearly, landlords and tenants may disagree as to the appropriate and acceptable level of noise that can be made. In this case, however, the Administrative Law Judge is persuaded that most landlords and most tenants would find the noise created by the Robys to be grounds for action and that the Respondent's actions resulted from noise and not from an illegal discriminatory motive.

J.L.L.